No. 15917

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. B. FRASER, R. B. FRASER, INC., a corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a corporation, and CHARLES FRASER, also known as CHAS. FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

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Appeal from the United States District Court
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INTRODUCTORY MATTER

It is not our purpose in this reply brief to consider in detail each of the arguments presented in the brief of the Appellee. Our purpose is to present as briefly as possible a demonstration of the basic flaws contained in those arguments and the matter hereinafter presented is intended to relate to Appellee's entire brief and argument.

ARGUMENT

Trespass within the meaning of 25 U. S. C. Sec. 179 and 25 C. F. R. Section 71.21.

The Appellee argues that a willful intent is not required to constitute a trespass under Section 25 U. S. C. 179 and 25

C. F. R., Section 71.21, and support this position in citing the case of *United States vs. Thompson, 41 F. Supp. 13 (E. D. Wash., 1941),* wherein the Court in passing said:

> "The defendant attempts to distinguish the cases on the grounds that they both involve actual or intended trespasses upon the part of the owners of the cattle. Well, that is true, and, strictly speaking, the two cases can be of value in cases of similar import, nevertheless, I am convinced from the language of the two opinions that they compel acceptance of the conclusion that the holding would have been the same without evidence as to intention of trespass."

Whether or not the Court in the *Shannon* and *Light* cases would have held the same although actual willful trespass was not shown is, of course, speculative; however, these cases can be distinguished from the case at bar in that they involve an interpretation of "willful" under the Federal Statutes and Regulations pertaining to grazing on forest reserve. The instant case involves a willful trespass upon Indian lands under Section 179 and the Code of Federal Regulations enacted thereunder.

In *Janus vs. United States, 38 Fed. (2d) 431,* this very Court reviewed the history of the present law. This history of the enactment of Section 179 indicates that "not only a willful act was intended but willful as contemplated in a criminal action." In order to determine the meaning we have but to turn to the case of *U. S. vs. Illinois Central R. Co., 303 U. S. 239, 58 S. Ct. 533,* where the Court said:

> "Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is shown to wilfully to have failed. In statutes denouncing offenses involving turpitude, 'wilfully' is generally used to mean with eil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication."

25 C. F. R. 72.21 does not in words necessarily broaden

the scope of *25 U. S. C. 179* to be unconstitutional but the interpretation given these regulaions in this case by the Appellee amount to the same. Regardless of the wording of the code of Federal Regulations, its effect can be no broader than the heretofore given interpretation of Section 179. In attempting to make a finding of livestock upon a reservation land without a permit a violation of Section 179 and Title 25 C. F. R., Section 71.21 is to extending the original Act into something which was not intended at the time the Act was passed or even conemplated.

It is true that the fence laws have no application to the commission of a trespass under 25 U. S. C., Section 179, and that the States cannot pass laws regulating government land held in the name of the United States Government. However, neither can the Secretary of the Interior through its Indian Departments interpret regulations extending the authority of the Indian Department and the Department of the Interior so as to change the meaning of Section 179 as enacted and followed by our Courts. It is the position of the Appellants that both the United States as Trustee of Indian lands and Guardian thereover, and the Appellants are left at a status quo and that if either wishes to prevent the drifting of livestock onto its premises where no willful intent is shown, then they are bound to fence livestock out. To hold otherwise would be a reversal of the open range policy and a reversion to English common law; a policy repudiated by our Courts in *Buford, et al vs. Houtz, 133 U. S. 320, 105 S. Ct. 305.*

INJUNCTION

Appellee's argument for the right to an injunction distinguishes the case at bar from the case of *LaMotte vs. United States, 256 Fed. 5 (C. A., 8, 1919 Affirmed 254 U. S. 570)*

on the grounds that in this case there was a finding of permanent injury to the inheritance. A careful reading of the testimony of the Government witness, Gordon S. Powers, (Tr. 190-191), shows that Mr. Powers, after qualifying as an expert made a general statement as to the results of over-grazing. He made no mention nor was any showing made that the land involved in this action was being overgrazed, or that the Appellants' cattle were committing any permanent damage to the land. Mr. Robert Yellowtail, a long time resident, rancher, and one-time superintendent of the Crow Indian Agency, stated that in his judgment this land was subject to very little, if any, permanent effect from overgrazing.

The evidence shows that the land in effect was open range and that Appellants had leased same from the Indian Service. The livestock of the Appellants and the livestock of the Lessees of the Government, the Cormier Bros., drifted back and forth upon the land, that the water in the area was on the Appellants' land and that there was more of an inclination for the livestock in the vicinity o stray onto the land of the Appellants than on the land allegedly trespassed upon by their cattle and therefore, this case is directly in point with *LaMotte vs. the United States,* and should be dealt with accordingly.

PENALTIES

The Appellee contends that on the basis of the evidence before the Court, the parties intended that the penalty clause in the range control stipulations was properly construed as a liquidated damage clause and that Appellee's statement in claim for relief in this complaint is not disproportionate to the damages sustained. Appellee asked in its complaint for a total sum of $5,159.85 for two separate trespasses by the Appellant in the same year.

The trial court in rejecting the Government's contention that it could recover more than once during a lease year said:

> "If the penalty is, in fact, liquidated damages, it must be based on a contract provision for year around grazing, and it was not inended that the payments should be due each time overstocking was found to exist. Each overstocking might properly be considered an act of trespass under the on and off provision, in which event the Government would be limited to $1.00 per head for each separate trespass. If there could be more than one recovery under paragraph 3 of the stipulations, the amount would be an unreasonable forecast of just compensation and could not properly be considered liquidated damages."

Under every consideration of all the facts, and the pleadings in the case, it is readily apparent that the Appellee brought this action under the guise of a penalty, and after failing to show that any actual damage on the part of the Appellants would now interpret the clause as liquidated damages.

The purpose of the Court in this case is to determine the meaning of the penalty clause at the time of execution of the agreements. Up until the trial of the issue there was no controversy as to its meaning. The Appellee should not at this stage be allowed to make one.

Based upon the foregoing and upon our original brief herein, we submit that no willful trespass has been proved as required under Section 25, U. S. C., Section 179; that the United States is not entitled to an injunction, that the penalty provision in the range controls stipulation where the penalty is designated and not a provision for liquidated damages and that the judgment appeal by the Appellants should be reversed.

Respectfully submitted,

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By:.....

Attorneys for the Appellants.